Harding Glass Company, Inc. *and* Glaziers Local 1044, International Brotherhood of Painters & Allied Trades, AFL–CIO. Cases 1–CA–31148 and 1–CA–31158

August 29, 2006

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 29, 2005, Administrative Law Judge Joel P. Biblowitz issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the decision of the administrative law judge and a motion to correct inadvertent typographical error in the Decision of the administrative law judge.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

This is a compliance case. Among other things, the judge found, and we agree, that discriminatee James Tritone's backpay should be calculated based on a glazier's rate of $22.05 per hour for his work from March 28, 1994 to April 15, 1994. Our dissenting colleague disagrees.

The facts are undisputed. Tritone began working for the Respondent as a glazier in 1988. In April, 1993, he suffered a severe wrist injury and was out of work for approximately 8 weeks. When Tritone returned to work, he continued to perform the tasks of a glazier despite being under medical care for his injury. The Respondent's employees commenced an economic strike on October 18, 1993. The strike ended a week later. On January 31, 1994,[2] the Respondent wrote to Tritone and offered him employment to a "modified duty (light work)" position. Tritone rejected this position through his workers' compensation counsel. On March 15, the Respondent sent Tritone a second offer for a "permanent light duty full time position." Tritone accepted this offer. On March 21, the Respondent clarified this second offer as a "temporary modified duty position" available for 45 days at which time the Respondent would evaluate Tritone's ability "to perform [his] regular duties as a glazier." When Tritone returned to work on March 28, he saw a posted notice describing the Respondent's workers' compensation program. The notice indicated that "[m]odified duty is temporary (no longer than 45 days). It is a process that provides full wages for an injured employee during recovery." Tritone's last day of employment for the Respondent was April 15, the date that he voluntarily quit.

Since Tritone was performing glazier work at glazier pay at the time of the strike, he was entitled to reinstatement as a glazier and to glazier pay upon his return. Tritone worked from March 28 to April 15, but he was not paid the glazier rate.

In contending that Tritone was only entitled to a nonglazier rate of pay, our dissenting colleague notes the judge's finding that Tritone returned to work that was "substantially different from the work that he had previously performed." Our colleague states that "Tritone did not, and could not, perform the work of a glazier." In this regard, he further notes that the Respondent's March 21 clarification stated that, after 45 days in a "temporary modified duty position," the Respondent would evaluate Tritone as to his abilities "to perform [his] regular duties as a glazier."

We agree that Tritone's work during the 2-week period was not the same as that performed prior to the strike. However, the issue is whether the work during that 2-week period was glazier work. Glazier work can encompass many duties. The fact that his work, upon return from the strike, was different from the work before the strike does not mean that his work upon return was not glazier work. In our view, it was glazier work, and thus Tritone was entitled to glazier pay. In this regard, the judge found that Tritone performed the glazier work of "measuring store fronts and doors for possible future glass replacement." Tritone testified that he not only performed these duties during the applicable period but that he had also performed them in the past as part of his regular glazier duties. Tritone also testified that, in addition to this specific glazier work, he picked up cars and brought them back to the shop to have the auto glass employees work on them. Tritone testified that he did this work during the applicable period and that he and other glaziers performed this work in the past. In these circumstances, we conclude that he performed glazier work.

Also, the Respondent had no agreement with the Union to permit it to pay less than the full contractual rate when an employee is on light duty. Joseph Guiliano, the Union's business manager, testified that the Union never had an agreement with the Respondent

[1] We grant the General Counsel's motion to correct inadvertent typographical error in the decision of the administrative law judge. The Respondent owes the Apprenticeship Fund the amount of $4,422.81, plus interest. We correct the administrative law judge's Order accordingly.

[2] All dates hereafter are in 1994.

whereby the Respondent "could pay the glaziers less than full contract rate while they were on any kind of light duty." Given that Tritone performed glazier work (albeit in a modified duty position) during the applicable period and that the Board's order required restoration of the status quo ante, it follows that the Respondent was obligated to pay Tritone at the glazier "full contract rate" of $22.05 per hour.

Finally, we note that article XIV of the parties' contract provided that "all employers of Glaziers Local 1044 must have Workers Compensation Insurance . . . to cover all members employed by them." The Respondent's notice described its workers' compensation program with the assurance that the program "provide[d]full wages for an injured employee during recovery" while that employee was filling a "temporary modified duty position" for 45 days. The Respondent's workers' compensation program was a term and condition of employment. It set forth the Respondent's policy regarding employees on modified duty.[3] Under that policy, Tritone was entitled to be paid at "full wages" based on the contractual glazier rate of $22.05 per hour. Our dissenting colleague's conclusion that the Respondent's "failure . . . to adhere to its workers compensation obligations . . . is an issue for another forum" is misplaced. We are not passing on the issue of how this policy of the Respondent would affect a determination made by a State workers' compensation agency. Rather, we are saying that, in this NLRB forum, we must decide what the Respondent should have paid Tritone. The Respondent's workers' compensation program was a term and condition of employment and, as such, provides additional support for a finding that Tritone was entitled to be paid the glazier rate of pay.

In sum, the General Counsel provided substantial evidence supporting that, but for the Respondent's unfair labor practices, employee Tritone would have been paid at a glazier's rate of pay. The Respondent failed to demonstrate that the compliance specification was in error. Accordingly, we adopt the judge's finding that James Tritone was entitled to the contractual glazier rate of $22.05 per hour for the period from March 28 to April 15, 1994.

ORDER

The National Labor Relations Board adopts the recommended Order of the Administrative Law Judge as modified below and orders that the Respondent, Harding Glass Co., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall make payments to the individuals and funds listed below, with interest.

The backpay to employees is as follows:

Robert Mosely	$9,497.48 plus interest
James Tritone	$975.89 plus interest
Richard Poirer	$70,345.89 plus interest
James Gabrielle	$18,846.38 plus interest
Richard VonMerta	$11,273.69 plus interest
David Elworthy	$6,979.14 plus interest
Mark Zaltberg	0
Christoper Carle	$4,057.24 plus interest
Christoper Pelletier	$16,191.19 plus interest
Kenneth Bullock	$5,908.05 plus interest

The payments due to the union funds are as follows:

Health and Welfare Fund	$181,994.31 plus interest
Pension Fund	$87,735.79 plus interest
Annuity Fund	$85,914.46 plus interest
Apprenticeship Fund	$4,422.81 plus interest

MEMBER SCHAUMBER, dissenting in part.

I agree with my colleagues in all respects save one. I would reverse the judge's finding that discriminatee Tritone's backpay should be calculated at the glazier's rate of $22.05 per hour.

Tritone began working for the Respondent as a glazier in 1988. In that capacity, he fabricated frames and doors, measured and cut glass, and installed windows and doors in storefronts. In April 1993, he suffered a severe wrist injury and was unable to work for approximately 8 weeks. From the date of his return through October 18, when the strike commenced, Tritone continued to perform his regular glazier duties, albeit under continuing medical care for his injury.

On January 31, 1994, the Respondent wrote to Tritone and offered him reemployment to a modified duty (light work) job that would entail, among other duties, measuring storefronts, repairing house windows, polishing small pieces of glass, and installing door closures. The Respondent's letter indicated that Tritone would be paid at the "current glazier's pay rate which is $13.73 per hour."[1] Tritone, through his workers' compensation counsel, rejected that job offer as inconsistent with the medical restrictions imposed by his doctor. Thereafter, on March 15, the Respondent sent Tritone a second offer, this one for a "permanent light duty full-time position consisting of calling on prospective customers, measuring work at jobsites, picking up and delivering customers' automobiles." The stated wage rate for the position was $13.73 per hour.

[3] The Respondent's March 21 letter to Tritone–with its reference to reinstating Tritone to a "temporary modified duty position" for 45 days—was fully consistent with and suggested that the Respondent was applying the "full wages" provision of its workers' compensation program to Tritone.

[1] One of the unlawful unilateral changes made by the Respondent on October 23, 1993 was a reduction of the glazier's rate from $22.05 per hour to $13.73.

Tritone accepted the second offer. On March 21, before Tritone returned to work, the Respondent sent him a letter clarifying that its offer was for a "temporary modified duty position." The letter listed the job duties set out in the March 15 letter, but added "general office procedures," and also stated that the position was available for 45 days "at which time we will evaluate your ability to perform your regular duties as a glazier."

When Tritone returned to work, he saw a posted notice describing the Respondent's workers' compensation program. The notice indicated that "[m]odified duty is temporary (no longer than 45 days). It is a process that provides full wages for an injured employee during recovery. . . ." The notice also stated that an injured employee who was unable to perform his duties would be transferred to another position—if one was available and he was qualified for it—and would "retain full seniority rights and wages."

The judge found that the work Tritone performed between March 28 and April 15 was "substantially different from the work" that he had performed as a glazier, but nonetheless determined that Tritone's backpay for that period should be calculated at the glazier's rate of $22.05 per hour. None of the reasons stated by the judge for reaching that conclusion is persuasive.

First, the judge noted that in the underlying unfair labor practice case, the Board found that the Respondent had violated the Act by unilaterally changing the glaziers' and glassworkers' wage rates. The judge then determined that when these employees returned to work after their strike, they had to be paid their wage rate before the unilateral change, namely $22.05 per hour. Had Tritone returned to a glazier's position, the judge would have been correct. However, as the judge himself found, Tritone—because of his physical limitations—could not perform the duties of a glazier and returned to work that was "substantially different from the work that he had previously performed." Because Tritone did not, and could not, perform the work of a glazier, the judge had no basis for awarding Tritone backpay at the glazier's rate.[2]

Second, the judge noted that the Respondent's March 21 letter said that the position was available for 45 days "at which time we will evaluate your ability to perform your regular duties as a glazier." The judge did not indicate, however, what significance he drew from that statement. Fairly read, the letter simply states that after 45 days the Respondent would evaluate whether Tritone could perform glazier duties. The statement has no impact on whether Tritone should have received the $22.05 per hour glazier rate during the March 28–April 15 period when he was performing "substantially different" duties.

The judge's final basis for finding that Tritone was due $22.05 per hour was a brief reference to the modified-duty policy notice that Tritone saw when he returned to work. That notice recited several "goals" of the Respondent's workers' compensation program, one of which was to return employees to full duty in the work force as soon as possible. To help achieve those goals, the notice states that the Respondent had instituted a modified duty policy, which "is a process that provides full wages for an injured employee during recovery . . ." Presumably, the judge believed that entitled Tritone to the glazier's rate of $22.05 per hour. However, whatever difference there may be between the language of the notice and what Tritone was paid is a matter for the State agency governing workers' compensation claims, and not the Board. If there was a failure by the Respondent to adhere to its workers' compensation obligations, that is an issue for another forum. The facts here clearly show that Tritone was not recalled to a glazier position and, thus, the Respondent was not obligated, under the specific terms of the Board's Order in the underlying unfair labor practice proceeding, to pay Tritone at the glazier's rate. Therefore, I would reverse the judge's determination that Tritone should have been paid at the glazier's rate of $22.05 per hour from March 28 to April 15.

[2] The judge also appeared to find it significant that the Respondent's January 31 offer of employment—which Tritone flatly rejected through his counsel—referred to the offered pay rate of $13.73 per hour as the "current glazier's pay rate." He noted that rate had been unlawfully set and should have been $22.05 per hour. The Respondent did have an obligation to offer the glazier rate of $22.05 per hour—but only if it were offering glazier work. In its January 31 letter, it was not offering such work to Tritone and accordingly its reference to the "current glazier's pay rate" in that letter is of no legal significance. Moreover, Tritone rejected the position offered on January 31, and the subsequent offer letter for a different position, which Tritone accepted, made no reference to a glazier's rate.

Karen Hickey, Esq. and *Sandra Clodomir, Esq.,* for the General Counsel.
Robert Weihrauch, Esq. for the Respondent.
Michael Feinberg, Esq. (Feinberg, Campbell & Zack, P.C.), for Charging Party.

SUPPLEMENTAL DECISION

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on May 2, 2005 in Boston, Massachusetts. The third amended compliance specification, which issued on January 19, 2005, alleges that Harding Glass Company, Inc. (the Respondent) owes the amount of $504,142.32 plus interest accrued to the date of payment. This amount is due as wages to Robert Mosely, James Tritone, Richard Poirer, James Gabrielle, Richard VonMerta, David Elworthy, Chris-

topher Carle, Christopher Pelletier, and Kenneth Bullock as well as to the following funds of Glaziers Local 1044, International Brotherhood of Painters & Allied Trades, AFL–CIO (the Union): the Health and Welfare Fund, the Pension Fund, the Annuity Fund and the Apprenticeship Fund.

I. BACKGROUND

On March 31, 1995, the Board issued the underlying Decision and Order herein at 316 NLRB 985, finding that the Respondent violated Section 8(a)(5) of the Act by unlawfully implementing, as its last and final offer, certain unilateral changes in its employees' terms of employment, effective on October 23, 1993, and that this change was made in the absence of a valid impasse in bargaining. On March 17, 1996, the United States Court of Appeals for the First Circuit enforced this portion of the Board's Order, and directed the Respondent to restore all terms and conditions of employment to the status quo as it existed on October 23, 1993, and to make whole all employees, and the Union funds, with interest, for any loss they may have suffered as a result of Respondent's unlawful unilateral changes. The Court, however, declined to adopt the Board's additional finding that the economic strike which began on October 18, 1993 was converted to an unfair labor practice strike on October 25, 1993, and therefore denied enforcement of that portion of the Board's Order.

Counsel for the Respondent, in his answer to the amended compliance specification which issued on January 20, 2000, included numerous defenses which counsel for the General Counsel felt were improper because they contravened the Board and the Court's findings. Counsel for the General Counsel notified counsel for the Respondent that his answer failed to meet the requirements of Section 102.56 of the Board's Rules and Regulations and that General Counsel would file a Motion for Partial Summary Judgment if the Respondent did not file an appropriate amended answer. On May 19, 2000, Counsel for the General Counsel filed with the Board a motion to strike portions of the Respondent's first amended answer to the original amended compliance specification and for partial summary judgment. On August 1, 2002, the Board issued a Supplemental Decision and Order (at 337 NLRB 1116), finding that the Respondent's Answer did not comply with the requirements of Section 102.56(b) and (c) of the Board's Rules and Regulations and that all of the Respondent's affirmative defenses were without merit. The Board therefore ordered that the Respondent's affirmative defenses be stricken, and granted the General Counsel's Motion for Partial Summary Judgment with respect to paragraphs 1 through 10 and 12 through 21 of the amended compliance specification, relating to the backpay period and the backpay calculations for all the employees. Pursuant to this decision, the only issues that Respondent could litigate were the amount of interim earnings and expenses of each of the employees and the status of James Tritone.

II. THE FACTS AND ANALYSIS

A. Interim Earnings

Regardless of the large amount of backpay and money due to the named employees and the Union funds herein, the hearing was extremely limited because of the Board's Supplemental Decision on counsel for the General Counsel's motion to strike. Even the issue of interim earnings, which normally would produce extensive testimony regarding the adequacy of the search for replacement employment and the wages therein is not a factor here because of the nature of the violation, and the fact that the interim employment was with the Respondent. As no evidence was introduced to contradict the interim earnings set forth in the Third Amended Compliance Specification, I find that the amounts set forth therein are correct.

B. The Strike

The economic strike began on October 18, 1993. At the time, the Respondent employed five unit employees, two glaziers, Tritone and Charles Jones, and three glass workers, including Mosely. Tritone and Mosely are the only employees employed by the Respondent at that time who are named. All of the glass workers returned to work after being on strike for 1 week. Jones never returned to Respondent's employ and obtained employment as a glazier elsewhere. As will be discussed, infa, Tritone returned from workmens' compensation status to work for the Respondent on March 28, 1994 and worked until April 15, 1994, when he returned to workmens' compensation status and filed for, and received, social security disability benefits. Of the other eight employees named in the compliance specification, five are glass workers and three are glaziers. The Union has separate contracts with the Respondent and other employers for glass workers and glaziers. Glass workers often perform inside fabrication work and residential and automobile glass replacement work, while glaziers measure, fabricate and install glass windows for storefronts and commercial customers. The hourly rate set forth for glaziers in the Glaziers' 1991–1993 contract was $22.05; the hourly rate for glass workers in the 1991–1993 Glass Workers' contract was $13.23.

The compliance specifications provide that backpay of the named replacement employees commenced on June 5, 1996, because the Union notified the Respondent on June 4, 1996, that the strike was terminated at that time. The basis of this finding is the June 4, 1996 letter that Union Business Manager sent to Robert Weihrauch, Esq., counsel for the Respondent. The letter states, inter alia:

> It is Local 1044's position that by January 1, 1994 its strike against Harding Glass was concluded. By that date, all striking employees (i.e. the glaziers) who were able to work had found other jobs and were not seeking reinstatement with Harding Glass. In addition, by that date Local 1044 had ceased its picketing at Harding Glass.

As no substantive evidence was introduced to contradict the assertions contained in this letter, I agree with counsel for the General Counsel's position that the Union's economic strike commenced on October 18, 1993, and concluded on June 4, 1996, and that the backpay period for the replacement workers began on the following day.

C. The Status of James Tritone

The only issue remaining for consideration, pursuant to the Board's Supplemental Decision and Order, is Tritone's

status. The issue is whether he should have been paid as a glazier, his job classification prior to the strike, or as a glass worker for the period that he worked from March 28 to April 15, 1994. The difference is the contractual rate contained in the 1991–1993 contract, for glaziers, $22.05 an hour, or for glass workers, $13.23 an hour. For the 3-week period that Tritone worked for the Respondent in 1994 he was paid $13.73 an hour, without any union benefits. Tritone began working for the Respondent as a glazier in 1988. As a glazier, he fabricated frames and doors, measured and cut glass and installed windows and doors in store fronts. In April 1993 he severed his wrist, cut a tendon and shred the nerves in his wrist. From that time through October 18, 1993, he was performing his regular glazier duties, although he was under medical care for his injury. The picketing of the Respondent's facility commenced on October 18, 1993, the same day that he had surgery on his wrist. He joined the strike and picketing on that day and did not return to work until March 28, 1994.

On January 31, 1994, Mark Goldstein, Respondent's owner, wrote to Tritone that Tritone's doctor indicated that he could return to work on a modified light duty program. The letter continued:

> We are offering you a modified duty (light work) job measuring storefronts, repairing house windows, polishing small pieces of glass, installing door closures, to name a few.
>
> We are offering you 100% of our current glaziers pay rate which is $13.73 per hour with Blue Cross HMO as health coverage paid by Harding Glass Co. Our desire is that, under strict medical supervision, you return to work with job restrictions, immediately.
>
> Please indicate below whether you accept or reject the offer of modified-duty employment as described herein. If we do not hear from you by February 11, 1994, we will assume you have rejected our offer and will proceed accordingly.

Tritone testified that he believes that his lawyer wrote to Goldstein saying that the job offered did not comport with the restriction imposed by his doctor. In response, Goldstein wrote to Tritone on March 15, 1994 stating:

> We are pleased to offer you a permanent light duty full time position consisting of calling on prospective customers, measuring work at job sites, picking up and delivering customers' automobiles. Your wage will be $13.73 per hour plus an employer paid Blue Cross/Blue Shield HMO.
>
> We must hear from you on or before March 24, 1994, otherwise, we will assume you have rejected our offer.

Tritone testified that he believes that his attorney notified the Respondent that he would accept that job offer, and by letter dated March 21, 1994, Goldstein again wrote to Tritone, stating:

> We would like to clarify the position that is available to you beginning March 28, 1994.This is a temporary modified duty position consisting of calling on prospective customers, measuring work at jobsites, picking up and delivering customer's automobiles, and general office procedures.
>
> This position is available for forty five days at which time we will evaluate your ability to perform your regular duties as a glazier.
>
> We look forward to seeing you on March 28, 1994.

On his first day of work upon returning, March 28, 1994, he saw a notice posted at the time clock. He had never seen it during the period of his prior employment with the Respondent. Entitled: "Modified-Duty Policy," it states, inter alia:

> Harding Glass Co., Inc. workers' compensation program has several distinct goals.
>
> 1. To provide employees with prompt, high quality care for their work-related injuries;
>
> 2. To compensate workers during the time they are disabled and unable to work; and
>
> 3. To return injured employees to full duty in the work force as soon as possible.
>
> To help us achieve these goals, we have instituted a modified-duty policy. Modified duty is temporary (no longer than 45 days). It is a process that provides full wages for an injured employee during recovery. . .
>
> Management Rights
>
> Job transfer: Any employee who, as a result of an accident on or off the job, or chronic disease or condition, is unable to perform his/her duties, shall be transferred to another position if work is available for which he/she is qualified or can be retrained within a reasonable period of time. He/she shall retain full seniority rights and wages.

The work that Tritone performed from March 28 through April 15, 1994, was substantially different from the work that he had previously performed for the Respondent. During this earlier period, the principal work that he performed was fabricating and installing store front glass windows and doors. So that, if a glass door or window at a store or other commercial facility was broken, or had to be replaced for any other reason, he measured the area, cut the replacement glass and, probably with another employee, installed the new glass door or window. For the period March 28 to April 15, 1994, he measured store fronts and, occasionally, picked up a car and drove it back to Respondent's shop where the glass workers performed the required repairs. The only "tools" that he carried were a tape measure, a ruler, paper and a pencil; he no longer carried, or used, a glass cutter. Goldstein testified that his workmens' compensation insurance company told him to put Tritone back to work on light temporary job duty. He had Tritone measure doors and windows of his existing customers, so that, if one of the customers subsequently called in to report a broken window or door, they would know the size involved and could replace it without further measurement. This work was performed in anticipation of possible future work from his existing customers.

An examination of Tritone's work classification, background and the work that he performed during this 3-week period presents a difficult issue of whether he should be paid

at the glaziers' hourly rate of $22.05 or the glass workers' rate of $13.23. He was a glazier and had been paid at that rate during the 5 years of his employment with the Respondent. However, it is also clear that the work that he performed from March 28 through April 15, 1994, was less than classic glazier work. The only glazier-type work that he performed during this period was measuring storefronts and doors for possible future glass replacement. However, I do not believe that it is necessary to examine his work during this period to determine the wage rate that he should have been paid. The Board's Decision and Order found that the Respondent violated the Act by unilaterally changing the wage rates of its glaziers and glass workers. Therefore, when these employees returned to work they had to be paid the wage rate prior to the unilateral change. Tritone was a glazier whose hourly wage rate was $22.05 prior to the change, and that is the rate he had to be paid upon returning. In addition, Respondent's documents herein support counsel for the General Counsel's allegations on this issue. Goldstein's January 31, 1994 letter to Tritone offering him reinstatement, states that it would be at ". . . 100% of our current glazier's pay rate which is $13.73 per hour. . ." However, that hourly rate was found to have been unlawfully instituted by the Respondent, and should have been $22.05. In addition, Goldstein's reinstatement offer of March 21, 1994 states: "This position is available for forty five days at which time we will evaluate your ability to perform your regular duties as a glazier." And finally, the notice that Tritone found at the Respondent's facility when he returned to work on March 28, 1994, in describing the Respondent's workmens' compensation program, stated that it provided "full wages" and "full seniority rights and wages" for the injured employee. I therefore find that Tritone should have been paid at the glaziers' hourly wage rate of $22.05 for the period March 28, 1994 through April 15, 1994.

[Recommended Order omitted from publications.]